

## Chapter 11

### Judicial Independence in the Accession Countries of Central and Eastern Europe and the Baltics

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The European Commission, in its reports on the Central and Eastern European countries applying for membership to the European Union, regularly points out the problems faced by the judiciary and the slow speed of court reform. The major concern of the Commission is the considerable backlog of pending court cases, the slowness of court proceedings, and deficiencies in the execution of court judgments. In short, the Commission primarily addresses the lack of efficiency in the judicial systems of the applicant states. Although mentioned in the reports on some of the countries, less attention is paid to what distinguishes the judiciary from other branches of government: independence and impartiality of courts and individual judges. However, if the term efficiency is interpreted not simply as the speed at which cases are completed, but is extended to indicate the quality of court decisions as well, the degree to which the independence and impartiality of the judiciary and individual judges are guaranteed becomes a crucial measure of performance.

This paper is based on the draft reports on Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovenia, and the Slovak Republic prepared within the framework of the *EU Accession Monitoring Program* conducted by the Open Society Institute.<sup>1</sup> This is a descriptive paper and it is not the intention of the author to elaborate on the different interpretations of judicial independence. In the course of the survey I shall simply address issues that are commonly held as forming part of or being closely related to the notion of judicial independence. These components or principles of judicial independence are listed in international instruments such as the United Nations Basic Principles on the Independence of the Judiciary<sup>2</sup> or the Council of Europe's Recommendation on the Independence, Efficiency and Role of Judges,<sup>3</sup> indicating the consensus regarding their relevance to judicial independence. One should be aware, however, of the limits of using the standards contained in these international instruments when assessing judicial independence in individual states. These instruments have to accommodate countries with different legal traditions and concepts of judicial independence; therefore, only basic requirements and minimum standards are set forth. That is why individual states are left with quite broad discretion in designing institutions that guarantee judicial independence. Institutions that provide for sufficient guarantee in one country may prove to be inadequate in another considering the country's legacy, the judiciary's composition, etc.

The organizational reform of the court system and the establishment of the institutional guarantees of judicial independence started in the early 1990s in the accession countries but are *still in progress*. In a number of countries the legislation adopted immediately following the political system change has been amended over the last decade and further changes are to be expected in the near future as well. A draft Law on the Organization of Courts is pending before the Romanian Parliament. In the Czech Republic, despite the fact that the bills envisaging a radical change in the status and operation of the judiciary submitted by the government were rejected in Parliament, the reform of the court system is likely to stay on the agenda in the future. In

1. See *EU Accession Monitoring Program Reports on Judicial Independence*, Budapest: Open Society Institute (2001).

2. Adopted by the Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders (Milan 1985), endorsed by General Assembly resolutions 40/32 of 29 November 1984 and 40/146 of 13 December 1985.

3. Recommendation No. R (94) 12 of the Committee of Ministers, adopted on 13 October 1994.

Latvia, the Law on Judicial Power adopted in 1992 has been amended eleven times and at present the need for adopting a new law is under discussion. The situation in Lithuania is similar, where following numerous amendments affecting the status of the judiciary a new draft Law on the Courts was submitted to Parliament in 2000. The Slovak Republic is drafting an amendment to the Constitution that would establish a Judicial Council with a majority of representatives of the judiciary whose members would take over most of the tasks performed at present by the minister of justice. At least, this is what the Association of Slovak Judges has demanded.

The fact that constitutional courts in many accession countries have been invoked several times to decide on the relation between the judiciary and the executive<sup>4</sup> indicates that there is still lack of clarity as to the exact notion of judicial independence or the concept of separation of powers. In this context it is worth noting that the constitutional courts in the accession countries frequently come to differing conclusions when passing decisions on the meaning and extent of judicial independence, separation of powers, and the violations of these principles. It seems that it is the Lithuanian Constitutional Court

4. In Bulgaria, e.g., the Constitutional Court was invoked to decide whether the justice minister's right to make proposals as to the appointment or dismissal of judges, to initiate disciplinary proceedings against them, or to lift their immunity is in compliance with the constitutional principle of the separation of powers. In Romania, the Constitutional Court ruled that laws adopted with the objective of suspending court procedures or the execution of court rulings are unconstitutional (see Judgment No. 73/1996). In Latvia, the Constitutional Court found violation of the principle of separation of powers in that the government, by adopting a resolution, interfered in matters that are within the courts' competence (Decision of the Constitutional Court, Case No. 04-07 (99), *State Gazette*, 29 March 2000, No. 113). The Constitutional Tribunal of Poland ruled several times on the financial aspects of judicial independence and has also proclaimed that judicial independence is one of the elements of the principle of division of power. In Lithuania, the Constitutional Court passed a significant decision in 1999 that gave the impetus to review and redesign the relationship between the executive and the judiciary (Decision of the Constitutional Court of 21 December 1999, No. 109-3192). In Hungary, the Constitutional Court was invoked several times to rule on the concept of judicial independence. In 1994 it proclaimed that any award reflecting appreciation for the judge's performance given by the executive without the involvement of judicial bodies constitutes interference with judicial independence (Decision of the Constitutional Court, No. 45, 1994, AB hat.). In the same year, the Constitutional Court ruled that in the absence of effective limits, the executive's authorization to transfer resources from the judiciary's budget established by Parliament is contrary to the constitutional provision guaranteeing judicial independence (Decision No. 28/1985).

that sets the highest standard. According to its ruling in December 1999, it proclaimed that the minister of justice's power to institute disciplinary action against the presidents and other officials of the courts and his or her competence to set the number of judges of the county courts and the court of appeals was incompatible with the Constitution. The Court also found that judicial independence prohibits judges from being transferred to the Supreme Court or the Ministry of Justice without their consent and through a decree of the president.<sup>5</sup> Constitutional courts in other countries usually do not find violations of the constitution when deciding on motions of similar contents.

In a number of countries judges and their associations complain of the *politicians' lack of understanding* of the importance and meaning of judicial independence. Thus, the Association of Latvian Judges has repeatedly voiced its concern about politicians' attempts to influence the outcome of individual cases. From Slovenia it is reported that the rather narrow powers of the minister of justice are not properly used. Between 1998 and 2000 the minister of justice made several attempts to remove the president of one of the district courts; his decision, however, was annulled by the ruling of the Administrative Court. In Bulgaria, the Parliament used the adoption of an amendment to the Law on the Judiciary for changing the composition of the Supreme Judicial Council. The use of more subtle forms of pressure is also reported from Bulgaria: speaking at the national meeting of judges, the prime minister advised judges to be more expeditious in convicting defendants charged with corruption. Reference by politicians to "shared responsibilities" is also quite frequent. As a result, and due to the lack of integrity of the judiciary, courts in "sensitive areas" such as restitution cases and bankruptcy proceedings tend to rule according to what they think is expected of them.

In some countries that have established strong self-governing bodies, the executive from time to time makes an attempt to regain some of its lost powers. This is reported from Slovenia, where the Minister of Justice tried to control the courts' effectiveness. However, the opposition of the judiciary frustrated the attempt and the government finally was forced to withdraw the bill.<sup>6</sup> In Hungary, the Ministry of Justice and the Parliament, by presenting draft bills and adopting laws, occasionally attempt to restrict the courts' com-

petence, particularly in the area of criminal justice.<sup>7</sup> In Estonia, the Ministry of Justice tried to transfer judges without their consent but its attempt provoked heavy criticism and finally failed, as did the Ministry's effort to obtain the power to select judicial candidates.

These examples prove the truth of the claim that it is primarily the firmly fixed and effectively implemented principles of separation of powers and, above all, the institutional independence of the judicial branch that have to be guaranteed in the new democracies and not solely the personal independence of judges. The courts' subordination to and dependence on the executive (and to some extent the legislature) in the previous political regime, resulting in judiciaries being placed at the bottom of the hierarchy of government branches, seems to have had a lasting effect on the values, beliefs, and practices of many in positions of power. Thus, the genuine separation of the three branches of government and firm institutional arrangements for judicial independence may prove effective in protecting courts and judges from intrusion by the political actors of the still immature democracies.

It should also be noted that in spite of the new laws on the courts and judges, a number of laws affecting the operation of the courts, which could contribute to the judiciary's more effective operation, have not yet been adopted or put into effect. In the Czech Republic, the Parliament adopted a new code of civil procedure, which entered into force on 1 January 2001; however, the draft law on the amendment of the code of criminal procedure was rejected. In Hungary, Parliament adopted a new code of criminal procedure in 1998 but the new Parliament decided to postpone the date of its entering into force to the year 2003. From Lithuania it is reported that the new Law on Administrative Procedure has not yet been adopted. Many of the countries under review still do not have adequate legislation on the execution of court judgments. The failure of parliaments to adopt the necessary legislation, or the poor quality of laws coupled with the legislature's and the

5. Decision of the Constitutional Court of 21 December 1999.

6. The efforts of the minister of justice in Slovenia to regain some of his powers can also be explained by the fact that the transfer of competencies to the self-governing judicial bodies may even question the existence of the Ministry of Justice. The idea of abolishing the Ministry of Justice was raised recently in a paper published by a distinguished scholar of administrative law.

7. The Law on Criminal Procedure adopted in 1998 contained a provision according to which after the first instance judgment, courts were obliged to order or extend pretrial detention if the prosecutor so requested, provided that the defendant's prison sentence imposed by the first instance court was not less than three years. This provision was struck down by the Constitutional Court on 25 June 1999 as it was in clear violation of the Constitution, which in section 55, par. 2 provides for an autonomous judicial decision on arrest and detention. In 1999 Parliament adopted an amendment (Act CIV of 1999) to the Law on Corrections that stipulated that judges may place convicts under a lighter regime only on the initiative of the penal institution's representative, whereas the original text of the law dating back to 1993 contained no such restriction.

executive's reluctance to provide for adequate material conditions, necessarily result in the courts' poor performance, provoking the criticism voiced by those who share responsibility for that performance.

## 1. INSTITUTIONAL INDEPENDENCE AND PRESSURE AREAS

### 1.1 *The Judiciary, the Courts, and Judges in the Accession Countries*

#### 1.1.1

Before addressing specific areas of judicial independence we attempt to give a rough description of the constitutional and statutory framework of the court system. We extend our review to the composition of the judiciary, which has changed considerably as a result of the dramatic political changes in the accession countries.

The judicial authority in most of the countries comprises *exclusively judges* in the strict sense. In Bulgaria, on the contrary, judges, public prosecutors, and investigators form part of the judicial branch and are called magistrates. The Bulgarian constitutional arrangement, primarily the placement of the prosecution service under the judicial branch, is heavily debated nowadays, and the proposal to transfer the prosecution service to the executive is discussed. In fact, the present arrangement, providing for the equal treatment of the three bodies that make up the judicial branch, is a source of tension.<sup>8</sup>

In Romania, according to the 1991 Constitution, in addition to courts, the so-called Public Ministry, that forms part of the "Judicial Authority", acts as the supervisory body of the prosecution service.<sup>9</sup> Accordingly, judges and prosecutors are members of the *magistrature*.<sup>10</sup> The Law on Judicial Organization of 1992 makes it clear that judicial functions are performed exclusively by the courts and therefore it is actually the courts that are part of the judicial branch, whereas the prosecution service is considered part of the executive. Because the Superior Council of Magistracy—the body deciding on crucial issues affecting the careers of judges—has prosecutors among its members,<sup>11</sup> the fear that the executive may jeopardize judicial independence seems to be justified.

8. The proposal to amend the provisions on the immunity of magistrates without differentiating among the three bodies is the object of criticism in Bulgaria.

9. Constitution, Republic of Romania, Chapter VI.

10. The prosecution service is regarded as a judicial institution in Latvia as well.

11. The Superior Council is composed of ten judges and five prosecutors. The ses-

#### 1.1.2

The *constitutional and statutory guarantees of independence* in the accession countries have already been laid down. The basic guarantees are set forth in the constitutions, whereas provisions on the court system are referred to statutory law. But these latter laws also form part of the "constitutional order" in most countries and therefore have a special status within legislation.<sup>12</sup>

A basic precondition of judicial independence is that only *courts established by law* should be permitted to administer justice. This principle is set forth in all the constitutions. The Slovenian Constitution contains the explicit prohibition of establishing extraordinary and military courts.<sup>13</sup> Similarly, the Bulgarian Constitution prohibits the establishment of extraordinary courts, but specialized courts can be established and military courts also exist.<sup>14</sup> In Latvia, the Constitution gives an exhaustive list of courts that may hear cases, but adds that in the case of war or state of emergency military courts can also operate.<sup>15</sup> The Constitution of Lithuania stipulates that disputes of an administrative nature related to employment, family, or other relationship may be settled by specialized courts. In time of peace, courts with special powers may not be established.<sup>16</sup> In Hungary, the Constitution makes reference to the setting up of special courts for specific kinds of cases, but these may be established by law only.<sup>17</sup> In the Czech Republic and in Hungary military courts were abolished; however, in Hungary, military judges working within the county courts try cases of members of the armed forces and some of the criminal offences allegedly committed by members of the police. Military courts as special courts trying cases of members of the army and the police operate in the Slovak Republic but are seen as part of the general court system. In Romania, military courts have competence over civilians under certain conditions, and it is feared that the military judges' hierarchical subordination to the minister of defense may cast doubts on their independence and impartiality.

sions of the Council are chaired by the minister of justice who, however, has no right to vote.

12. This is reported, for instance, from Slovenia. In Hungary, the adoption and amendment of the Law on the Organization of Courts requires a special quorum.

13. Constitution, Republic of Slovenia, Art. 126.

14. Constitution, Republic of Bulgaria, Art. 119.

15. Constitution, Republic of Latvia, Art. 86.

16. Constitution, Republic of Lithuania, Art. 111.

17. Act 66 on the Organization and Administration of Courts, 1997, Arts. 19, 20, 23.

The *supreme courts* assume a particular role in most of the accession countries. In addition to deciding on appeals of judgments of lower courts or acting as courts of cassation and passing judgments in order to ensure that laws are applied and interpreted in a uniform manner, supreme courts or their presidents also perform certain administrative functions.<sup>18,19</sup>

### 1.1.3

The *composition of the judiciary* in most countries has changed considerably in the course of the political transformation. In Romania, the Ministry of Justice has made continuous efforts to recruit young people, primarily those who graduated after 1990. Judges in Hungary are also relatively young; around fifty percent have no more than ten years' experience. In the Czech Republic under the so-called lustration law, which ruled that individuals who had leading functions in the Communist Party, were members of the Party militia, or who had cooperated with the state security service should be barred from public posts, all judges had to undergo a screening process before being reappointed.<sup>20</sup> As a result, a number of judges left the judiciary and the minister of justice replaced the overwhelming majority of court presidents. At present almost half of judges have less than ten years' experience and the proportion of judges with less than two years' work experience is quite high.

18. The Lithuanian Supreme Court's Senate is the body that decides on appeals submitted against decisions of the Judges' Examination Commission and decisions of the Judges' Court of Honor in disciplinary matters (the Senate is made up of the president, the heads of divisions of the Supreme Court, seven judges from the Civil Cases and seven from the Criminal Cases Division). In Estonia, it is the Supreme Court that makes the proposal to the president regarding the appointments of the judges of the first instance and the appellate courts (Supreme Court justices are appointed by Parliament upon the proposal of the chief justice of the Supreme Court). In Bulgaria, the president of the Supreme Court may initiate disciplinary proceedings against judges of the Supreme Court and the courts of appeals. In Romania, the Superior Council of the Magistracy acts as the disciplinary body for judges and in this case, in contrast to the general rule, it is the president of the Supreme Court (not the minister of justice) who presides over the proceedings. In Poland, the special status of the Supreme Court (and the Supreme Administrative Court) is reflected in that, contrary to "ordinary courts," they are completely detached from the Ministry of Justice and have budgetary autonomy.

19. It should be noted that the constitutional courts established after the change in the political regime are outside the ordinary court system.

20. Czech Lustration Law, No. 451/1991 Coll.

In Poland, judges are required to make a declaration about their cooperation with the Communist state security bodies. If a court establishes that the declaration is false, the judge fails to meet the moral requirement needed for discharging his or her public function. In addition, judges are subject to specific verification procedures under the Law adopted in 1998 on the Disciplinary Accountability of Judges Who Violated the Principle of Judicial Independence in 1944-1989. Judges found guilty under the law may be expelled from judicial service by the Disciplinary Court.

In Estonia there is no procedure for the removal of judges who "sinned" under the communist regime. However, judges who were active in the Communist era had to reapply for their position and go through the ordinary appointment procedure. All judges have to take an oath in writing and assure that they have not been in the service of, or been an agent of, a security organization and have not been involved in persecuting persons because of their political beliefs, social class, or activity in the civil service or defense service of the Republic of Estonia.<sup>21</sup>

In Hungary, the gradual and peaceful transformation meant that judges could keep their posts and their legitimacy has not been questioned for some time. But following unpopular decisions, certain political groups voiced their doubts as to the integrity of the old "Communist" judiciary and urged security checks on judges and screening of their past (checking their private life in order to disclose vulnerability to eventual blackmailing by criminals). The calls for screening judges resulted in the extension of the 1994 lustration law to judges in 2000.<sup>22</sup> Some argue that submitting judges to this type of screening ten years after the change in the political regime has no purpose other than to send a message of the politicians' distrust and discontent. Considering the fact that at the same time the lustration law was also extended to journalists and other media people in leading positions who have been accused from time to time of being agents of the opposition and serving foreign interests, the assumption is certainly not completely absurd.

In Slovenia no lustration law was adopted; the Law on Judicial Service, however, provided that those judges who violated fundamental human rights and freedoms should not have their mandate renewed after the expiry of their term.<sup>23</sup> This provision was invoked in one single case and since judges are now appointed for life, the mentioned provision is no longer relevant.

21. Oath of Clear Conscience Act, RT 1992, 31, 408.

22. Act 23 on the Screening of Individuals in Important State Positions, 1994 and Act 93, 2000.

23. Judicial Service Act, Art. 8 (3).

That judges are young and graduated after the collapse of the Communist regime does not necessarily guarantee their integrity. From Romania it is reported that judges on the lower courts are between twenty-two and twenty-five years of age and therefore lack any life or legal experience. Their moral integrity may not be checked prior to their appointment; however, the same holds true for the older generation at higher courts as well since they have not been subjected to professional or integrity screening either. There seems to be a tendency to raise the age limit for becoming a judge. Slovakia amended its Constitution, raising the age from twenty-five to thirty years.<sup>24</sup> In some countries, such as Hungary, the period of judicial apprenticeship has been extended.

## 1.2 *Separation of Powers: The Independence of the Judicial Branch and of Individual Judges*

### 1.2.1

Some of the constitutions explicitly declare the principle of the separation of powers. The Bulgarian Constitution proclaims that the "power of the state shall be divided among the legislative, the executive, and the judicial branch."<sup>25</sup> According to the Lithuanian Constitution, it is the Parliament, the president, the government, and the judiciary that exercise the powers of the state. The Constitutions of Estonia and of Poland, in addition to referring to separation, proclaim also the balance of powers. The Constitution of Poland adds, "courts and tribunals shall constitute a separate power."<sup>26</sup> There is no express provision on the separation of powers in the Romanian, the Latvian, or the Hungarian Constitutions; nevertheless, all provide for distinctive tasks for each branch. In spite of this, the explicit reference to the principle of separation of powers seems to be a stronger safeguard against intrusions into the competence of each power and against attempts aimed at weakening judicial independence.

The Bulgarian Constitution also proclaims the independence of the judicial branch, as do the Constitutions of Poland, the Slovak Republic, and Estonia.<sup>27</sup> This, however, is not the case in all the countries.<sup>28</sup> What all

constitutions proclaim, however, is the independence of individual judges. Accordingly, judges shall be independent and in the performance of their functions they are subordinated only to the law. It is important to note that according to the Romanian Constitution, the provisions on the independence of the judiciary may not be revised.<sup>29</sup>

### 1.2.2

The principle of separation of powers is also reflected in the rules on *incompatibility*. Judges may not be members of national or local parliaments or governments and may not hold posts in the civil service.<sup>30</sup> As reported from Bulgaria, these strict rules are not always observed in practice; there have been cases in which judges were appointed to posts in the executive (as deputy minister of justice and as secretary general in the Council of Ministers) while retaining their judicial posts.

In Hungary, judges, with their consent, may be assigned to work for the Ministry of Justice without losing their post and title. Of course, they may not act as judges during this time. As concerns remuneration, the provisions on judges continue to apply to them. However, if appointed to leading posts (secretary of state or deputy secretary of state) they have to resign, though there are techniques by which this provision can be circumvented. A draft Law on the Courts in Estonia contains a similar provision: the judicial powers of judges working for the Ministry of Justice should be suspended, whereas their salaries and social benefits would not be affected by their assignment to the ministry. It is worth noting that this type of mobility between the judiciary to the civil service was declared unconstitutional in Lithuania by the December 1999 decision of the Constitutional Court mentioned above.

As a general rule, judges may be appointed to various commissions or committees. In Romania, for instance, they may serve as members of the Citizenship Commission, the Election Commission, or the Commission for

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in the republic "an independent judicial branch exists alongside the legislative and the executive power."

24. Const. Slovak Rep., Art. 145.

25. Const. Rep. Bulgaria, Art. 8.

26. Const. Rep. Poland, Art. 173.

27. The Lithuanian Constitution, in Art. 109, proclaims that judges and courts shall be independent.

28. There is no such provision in the Constitutions of Slovenia, Romania, Hungary, and Latvia. In Latvia, it is the Law on Judicial Power (Art. 1) that proclaims that

29. Constitution, Republic of Romania, Art. 148.

30. In Bulgaria the office of a judge is incompatible with membership in the National Assembly, the post of minister, deputy minister, mayor, and municipal councilor. A judge may not hold any elected or appointed office in state, municipal, or business organs. In Romania, in addition to the incompatibility of the judges' post with membership in Parliament and the Cabinet, a judge may not be at the same time the president of the Republic. In addition, judges may not be appointed trade union officials.

Private Property Investigation, among others. In Latvia, one of the members of the Central Election Commission, an independent body established for preparing and supervising national and municipal elections and referenda, is a judge. According to the Polish Law on Parliamentary Election, district election committees are composed of judges of courts of different levels nominated by the justice minister. In these cases, however, judges act in their capacity as members of the judiciary. In Latvia, a judge of the Supreme Court is acting as a consultant to the State Human Rights Bureau, an independent state organization with the task of promoting the observance of human rights and fundamental freedoms.

If judges wish to run for election, they have to resign from office. In Slovenia, a judge's post is suspended only after he or she is elected president of the republic, MP, judge to the Constitutional Court, prime minister, or ombudsman, or appointed as a minister.<sup>31</sup> In order to eliminate any doubt as to politically-motivated bias, it is recommended in Slovenia that judges be permitted to run for elections only after their resignation from judicial office. In Poland, the regulation on the statutory level (the Law on the Judiciary) states that judges should be granted unpaid leave of absence when obtaining a parliamentary mandate. The provision of the Constitution (adopted later than the relevant provision of the Law on the Judiciary) sets stricter standards. It proclaims that judges (and prosecutors) may not hold a parliamentary mandate; accordingly, judges have to resign if elected.<sup>32</sup>

### 1.2.3

Conflicts may arise if the competence and procedure of *parliamentary investigation committees* are not clearly defined. This is the case in Latvia where there are but a few provisions on the matter in the Rules of Procedure. Therefore, the question whether the activity of the Parliamentary Investigation Committee intrudes into areas that are in the exclusive competence of the courts and the prosecution service is raised quite frequently. From Slovenia it is reported that the competent parliamentary commission may conduct investigations into pending cases and its findings may jeopardize judicial independence. In theory, the judge concerned may file a complaint alleging the violation of the principle of the separation of powers and of judicial independence, but the

31. In the Slovak Republic judges need to leave the bench only if elected or appointed to an office. The situation in Hungary is similar; a judge's post is suspended until the results of the election have been published.

32. Constitution, Republic of Poland, Art. 103.

root of the problem, i.e., the lack of an explicit prohibition against investigating pending cases, is not solved by this possibility.

### 1.2.4

It is common in the countries under review that judges are not allowed to be members of *political parties or to be engaged in political activities*. Although the ban on party membership was introduced as a reaction to the Communist past the prohibition is still perceived as a genuine guarantee of independence.

It was in 2001 that Slovakia decided to follow the general pattern. As of January 2001, judges in Slovakia may no longer be members of political parties.<sup>33</sup> Until then, no such prohibition existed. As reported, there was just one case where a high justice publicly indicated his support for a certain political party and was also included on the list of candidates for the 1994 parliamentary elections. Although judges had reservations, this was not openly expressed and no disciplinary procedure was initiated.

In Slovenia, on the contrary, there are no plans to prohibit judges' membership in political parties. As reported, judges behave with self-restraint and have not been accused by the public of being politically biased. However, it is felt that political beliefs may influence judicial decisions. In order to eliminate hidden political bias it is suggested that judicial training should extend also to making judges aware of the social context of the decision-making process, something that is not currently included in the curriculum of the Slovenian Judicial Training Center.

## 1.3 *The Strength and the Prestige of the Judicial Power: Measures Aimed at Raising the Judiciary's Prestige and Integrity*

### 1.3.1

When assessing the strength of the judiciary different indicators can be used. One of them is certainly the number of judges, which also reflects the extent of power and functions vested with judges in the individual countries. But this is exactly why one has to be cautious in using the number of judges as an indicator when comparing different countries. To give but one example, in systems where pretrial investigation is conducted by judges (*juges d'instruction*) the number of judges is likely to be higher than in those which leave pretrial procedure to be conducted by the police and the prosecutor. The figures show that there are no extreme differences as to the number of judges (or judicial posts)

33. Act No. 385/2000 on Judges and Lay Judges.



in relation to the population in the individual accession countries<sup>34</sup> and that the number of judges is continuously increasing. In Hungary, for instance, their number over the last decade has increased from 1,611 in 1990 to 2,510 in 1999. The increase in the number of judges is of similar magnitude in Poland where, as compared to 5,165 in 1989, there were 8,162 judges and assessors in 1999. In Lithuania there were 456 judges in 1996, whereas their present number is 618.

Some of the accession countries eliminated the three-tier court system in favor of the *four-level court structure* that had existed before the Communist take-over. One of the motives behind reintroducing a new court instance in the Czech Republic, the Slovak Republic, Lithuania, and Hungary was certainly the intention to indicate the break with the Communist past and to demonstrate the increase in significance and prestige of the judiciary. But recently, with reference to expediency, the rationality of the change has been questioned in some countries. In Hungary, the Parliament elected in 1998 postponed setting up a new court instance.<sup>35</sup> In the Czech Republic, two high courts were set up and started to function in 1995; now the government has introduced a bill that would abolish them.

The increase in the number of judges originates in the establishment of rule of law standards that have resulted in considerable *extension of the courts' competencies and powers*. As a result of increasing judicialization, courts have assumed a greater role and this has strengthened the judiciary's position in relation to the executive and legislature. Courts have become the guardians of human rights and fundamental freedoms. The Constitution of Lithuania explicitly proclaims that anyone "whose constitutional rights or freedoms are violated shall have access to the courts"<sup>36</sup> and the Hungarian Constitution contains a

34. In Bulgaria there are 1,294 judges (population: 8.34 million); in the Slovak Republic 1,167 (population: 5.4 million). Romania has 23 million inhabitants and 3,665 judges. In Slovenia, Hungary, and the Czech Republic the number of judges is relatively high: in Slovenia there are 786 posts for 2 million inhabitants; in Hungary, a country of 10.17 million, there are 2,510 judges; in the Czech Republic there are 2,531 judges for a population of 10.3 million. In Lithuania there are 618 judges (population: 3.5 million), in Latvia around 440 (population: 2.4 million), and in Estonia 226 (population: 1.5 million).

35. According to a separate law on the seat and competence of regional courts, the new instance should have been introduced in two stages. Three regional courts should have been set up by 1 January 1999 and two more by 1 January 2001. The new Parliament, however, on the initiative of the government, which had referred to the lack of financial resources, amended these laws and accordingly one single regional court with countrywide competence should be set up 1 January 2003.

36. Constitution, Republic of Lithuania, Art. 30.

similar provision.<sup>37</sup> However, legislation has failed so far to establish a procedure through which the alleged victims may invoke the relevant section of the constitution and therefore the institution is of no particular significance.

### 1.3.2

It should also be noted that reviewing legislation and executive measures on their compliance with the constitutions is the prerogative of the newly established *constitutional courts* in most countries.<sup>38</sup> The relation between ordinary courts and the constitutional courts is ambivalent, at least in some of the countries. On the one hand, constitutional courts through their rulings have made a considerable contribution to strengthening judicial independence; but on the other, certain tension, primarily between the supreme court and the constitutional court, is reported from some countries. In Hungary, representatives of the judiciary complain of the Constitutional Court's privileged status. While the Constitutional Court establishes its own annual budget and submits it directly to Parliament, in the case of ordinary courts it is the government that submits the budget proposal to Parliament.<sup>39</sup> Also, the proposal of the Ministry of Justice in autumn 2000 to place the decisions of the Supreme Court aimed at ensuring the uniform interpretation of legal provisions under the control of the Constitutional Court has provoked strong criticism from representatives of the judiciary. In Romania, the tension between the Supreme Court and the Constitutional Court is reflected in that the Supreme Court denies that decisions of the Constitutional Court bind the judicial branch.

### 1.3.3

As a result of increasing judicialization and the continuous extension of the courts' competence,<sup>40</sup> there is a permanent case overload that started in the

37. Constitution, Republic of Hungary, Art. 70(k).

38. This is not the case in Estonia where the country's Supreme Court exercises the functions of a constitutional court.

39. According to the Law on the Organization and Administration of Courts, the government is obliged to prepare a detailed note if the proposal of the NCJ and the bill submitted by the government to Parliament differ and to give the reasons for the difference as well.

40. In Estonia, courts were assigned the following new functions: enforcement of judgments in civil and administrative cases, registration of legal entities, real estate registration, and supervision of convicts on probation. In Poland, the increase in courts' workload emanated from, among other things, the granting to the courts the exclusive right to decide on pretrial detention in all phases of the



early 1990s. Courts in Hungary received 825,167 cases in 1991; 1,014,763 in 1994; and 1,299,806 in 1998. The figures indicate that the criticism of the courts' efficiency is not completely justified. They instead show that courts settle more and more cases, but both the number of incoming and unsettled cases has increased as well.<sup>41</sup> In the Slovak Republic, for instance, in 1992 the number of cases assigned to each judge was 368.4 and the number of settled cases 258, whereas the respective numbers for 1999 were 531.8 and 387.4. These figures indicate that adequate staffing and an increase in material resources and technical equipment have not accompanied the immense increase in the number of cases handled by courts. From Bulgaria it is reported that due to the lack of appropriate coordination among the different branches, neither material nor personal resources are secured when new functions and tasks are assigned to courts. Differences as to workload and backlog are reported from a number of countries. Of particular interest is the situation in Estonia where courts in the mostly Russian-speaking industrial area in the country's northeast are extremely overburdened due to the high proportion of unfilled posts. Hungary and Latvia share the same problem: it is the court(s) in the capital that have the heaviest load. According to the Ministry of Justice in Latvia, the Riga Regional Court proceeding as the first instance court would need nineteen months to complete the criminal cases presently pending. The overload of the Riga Regional Court results in provisions of the procedural laws on deadlines being routinely violated. Appeals are sometimes reviewed after defendants have already been kept in pretrial detention for a period equal to the prison term imposed by the first instance court and have, therefore, already been released. In Hungary, the reorganization of the Budapest Central District Court was considered with the aim of easing the court's workload, but no concrete measures have been taken so far.

#### 1.3.4

The importance attached to the tasks performed by the judiciary can be measured by the courts' share within the state budget and by the judges' compensation in comparison with that of members of the other branches.

criminal process, and the transfer of adjudicating misdemeanors and handling alien-registration matters to the competence of the courts.

41. In the last few years Hungarian courts have made some progress in reducing the number of pending cases. Their number dropped from 206,698 in 1997 to 187,938 in 1999. In May 2000 there were 168,000 pending cases and according to the estimation of the President of the National Council of Justice, the courts' backlog could be brought to the acceptable level by 2002.

As to the judiciary's share in the state budget, reporters in most countries are of the view that the proportion courts receive is relatively low. In Estonia the budget of the judiciary represents 0.76 percent of the overall budget; in Hungary the respective ratio is 0.89 percent.<sup>42</sup> The share of courts in Lithuania is relatively high (1.55 percent in 2000).<sup>43</sup> In Poland the respective proportion is 1.37, but for 2001 a slight reduction was planned (1.29 percent). In the report on the Slovak Republic the amount allocated to the Ministry of Justice is 1.98 percent of the total budget but it is clear that only part of the sum is allocated to courts. In the Czech Republic the so-called justice sector receives 2.05 percent of the total state budget expenses; the budget for the courts and the prosecution service represents 1.19 percent of the overall budget. In Romania, the share of courts and of the prosecution service from the overall budget of 2000 amounts to 1.73 percent.<sup>44</sup>

In most countries under review *judges' salaries* have been increased considerably in the course of the last few years and they are comparable to those of members of Parliament and civil servants in leading positions. In Latvia, for instance, the Supreme Court justices' salaries are equal to the salaries of civil servants in the first category, while regional court judges get eighty-five percent of that amount. Salaries are supplemented by so-called additional payments varying from twenty to one hundred percent of the salary, depending upon the category to which the individual judge belongs. However, it is reported that judges sometimes do not receive the full amount of the additional payment they are entitled to and that budgetary shortages also block promotions. In 1999 and 2000, district court and regional court judges did not receive the benefit they are entitled to under the Law on Public Service when taking their annual vacation.

In Poland judges are still fighting for remuneration equal to that of members of Parliament. They invoke the Constitution, which states that the conditions under which judges work as well as their compensation should correspond to the dignity of their office and to their responsibilities.<sup>45</sup> As the provisions of the Constitution are directly applicable (unless explicitly provided to the contrary by the Constitution), judges in 1999–2000 lodged more

42. The respective share of the prosecution service is 0.32 percent, the Ministry of Justice 0.80 percent, the Ministry of Defense 4.99 percent.

43. The figure does not include the budget of the Supreme Court.

44. The categories Defense, Public Order, and National Security received 15.97 percent of the 2000 budgetary expenses.

45. Constitution, Republic of Poland, Art. 178(2).

than five hundred claims before ordinary courts and also filed a motion with the Constitutional Tribunal.<sup>46</sup>

The situation in Lithuania is unique; in 1997, judges' salaries, with reference to the need to safeguard their independence, were increased considerably by a government decree. As a consequence, judges received almost nine times more than the average income. Due to the negative reaction of the public and the economic and financial problems of the country, salaries of some categories of judges were reduced on the initiative of the new government in 1999. It is worth noting that the decision on reducing judicial salaries was taken in contradiction of the Constitutional Court's ruling in 1995 which stated that "any attempts to reduce judges' salaries and social benefits or cutting funds of the courts is to be considered as infringement of the judges' and the courts' independence."<sup>47</sup> Accordingly, the Constitutional Court, in July 2001, declared the reduction in salaries unconstitutional.<sup>48</sup>

It is quite common that judges' salaries are calculated with a view to those of civil servants. Accordingly, fluctuations in the civil servants' compensation will affect and eventually reduce judges' salaries. This is reported from Estonia as concerns the compensation of the president of the Supreme Court. Also, in other countries campaigns to reduce expenditures in the public sector extend to the judiciary as well.

It should also be added that in most countries MPs receive additional compensation for membership in various committees and also have broader opportunities for additional earnings as the rules on outside activities are less stringent than is the case with judges. On the other hand, judges enjoy rights and benefits to which representatives of other branches are not entitled, such as irremovability from office and in some countries, like Poland, longer holidays and better retirement conditions. The retirement age for judges in Hungary is seventy; in Poland, with the consent of the National Council of the Judiciary, judges may continue until age seventy, despite having passed the retirement age of sixty-five.

The increase in judicial salaries has undoubtedly increased the attractiveness of judicial posts and as a result vacancies in most countries are filled.

46. In Romania, judges formulated demands for appropriate work conditions and social security. As a result of their protests, important changes have occurred concerning their financial situation and, to some extent, their working conditions.

47. Repeated in Decision of the Constitutional Court of 21 December 1999, *Official Gazette*, No. 109-3192.

48. Decision of the Constitutional Court of 12 July 2001, *Official Gazette*, No. 62-2276.

This is clearly the case in Slovenia and Hungary where the number of candidates for judicial posts is relatively high. From Romania it is reported that at present lawyers, primarily the young ones, move from the private sphere to the bench. In Lithuania vacancies tend to decrease as well: whereas in 1998 there were 126 vacancies, the number decreased by mid-June 2000 to 64. According to the minister of justice, all posts should have been filled by the end of the year 2000. This is all the more desirable as the relatively high number of unfilled posts at the lower court level is still a painful problem and is the main reason for the immense workload of these courts.<sup>49</sup>

### 1.3.5

The strength of the judicial branch can be measured by how the judiciary is perceived by politicians, by the legal profession, and by the general public. In general it is felt that there is not sufficient political will to address the problems of the judiciary with the necessary vigor and consistency, as reported from the Slovak Republic and from Latvia. The Latvian Association, for instance, sent several messages to the government and to Parliament urging the improvement in the material conditions of courts; however, the addressees have not even replied to these letters. It should be added that Latvia's President admitted that there have been only minimal improvements in the judicial reform process.

In spite of tensions between the executive and the judiciary reported by many countries, court judgments are generally observed and respected by governments. However, it is disquieting that countries report serious deficiencies in executing judgments passed in civil cases, a problem that can be traced back to the absence of the appropriate organizational framework.

Regarding the assessment of the judiciary by the legal profession, it seems that the judicial office has become more attractive among law graduates as compared to in the Communist era. The assumption is supported by the fact that vacancies tend to be filled, as indicated above.

As to the judiciary's assessment by the public, there are significant variations. In Slovenia, it seems judges are seldom targets of public denunciation and enjoy a good reputation; no case of corruption has been detected and no allegations of corruption have been made. It is worth noting that the media made a substantial contribution to the fact that an adequate budget for the judiciary was adopted by Parliament in 1999.

49. The reason is that vacancies at the Supreme Court and the Court of Appeals have been filled with judges of the lower instances.

In Romania, on the contrary, public opinion has constantly expressed mistrust of the judiciary.<sup>50</sup> According to an opinion poll conducted by Transparency International in 2000, Slovakian judges, together with medical doctors, are considered the most corrupt professional group in the country. In the Czech Republic the 1995 Law on Judges' Remuneration, which brought judicial salaries to the level of those of members of Parliament and government, has never been supported by civil servants or the public at large. Also, the media presents judges as well paid but unable to perform their tasks. In Lithuania, the considerable increase in judges' salaries in 1997 provoked negative public reaction. Bulgaria reports that the judicial system does not enjoy the confidence of the public. With reference to alleged corrupt practices, even the lifting of immunity guaranteed by the Constitution is under consideration.

In order to enhance the transparency of judicial income and, in some countries, with the aim to prevent corruption, public disclosure rules have been introduced or the existing ones extended to judges. This is particularly the case in countries where allegations of judges' corrupt practices are relatively frequent. Thus in Romania, Law No. 115 of 1996 proclaims that judges at the beginning and the end of their term have to make a financial declaration regarding their assets. The declarations have to be kept secret. The Estonian Anticorruption Act adopted in 1999 says that the judges' declarations on their financial interests are to be submitted annually and published in the *Official Gazette*. In the Slovak Republic the obligation to disclose one's financial conditions is restricted to the so-called "constitutional representatives and higher state officials," the president and vice presidents of the Supreme Court and judges of the Constitutional Court among them.

### 1.3.6

As concerns the relation between the courts and the media, in most countries court decisions are followed and commented on by the media. The way judges and their decisions are presented and frequently criticized by the media reflects the judiciary's lack of understanding of the role media play in a democratic society. The description given in the report on Slovakia, according to which judges do not like "pressures from outside exerted by the

50. According to a poll from 1997, 48.5 percent of the population expressed mistrust of judges because of their corruption. According to another survey published in 1998, only 20 percent of the population is of the opinion that the justice system is functioning well. In 1997 the minister of justice publicly proclaimed that over 60,000 complaints were filed against magistrates alleging the improper handling of cases. In his view this fact indicates the arbitrariness within the administration of justice.

media," is representative of the countries under review. At the same time, the accusation by judges that journalists lack the necessary knowledge in matters of law<sup>51</sup> and are unaware of the value of judicial independence may also be true. In Slovenia, however, the media has made a considerable contribution to strengthening the guarantees of judicial independence. With media support representatives of the judiciary succeeded in persuading members of Parliament of the need to adopt an adequate budget for the judiciary in 1999. The tension between the media and the courts is partly due to the lack of appropriate channels of communication. As it is generally forbidden for judges to comment on the cases they try, the institution of court spokespersons may contribute to easing the tension.

### 1.3.7

The "qualities" of the judiciary and the integrity of individual judges are reasons that competencies are assigned to the courts. Or, the other way round, the *lack of integrity* may serve as an argument against strengthening judicial self-government. This seems to have been the case in Slovakia where the government, when submitting the draft on the Law on the Courts to Parliament, refused to follow the proposal of the Judges' Association and maintained the justice minister's power to appoint court presidents instead of transferring it to the Judicial Council. The reason for the refusal might have been the bad experience of the minister of justice, who after the 1998 elections made attempts to involve judicial associations and judges' councils in the appointment process but came to realize that judges sometimes tried to retain colleagues suspected of corruption.

## 1.4 Body of Representation

### 1.4.1

Whether the judiciary is strong enough to represent itself depends, to a large extent, on whether the body authorized to represent the judiciary is clearly identified. In some of the countries there is a certain lack of clarity regarding representation. No constitutional or statutory body of representation exists in the Czech Republic; in practice it is the Ministry of Justice that presents itself as the representative, and the minister of justice that bears political responsibility for the judiciary. As indicated in the introduction, the draft law amend-

51. Thus it is reported from several countries that the media are unable to accommodate the public's legitimate interest in being informed of criminal cases and the presumption of innocence.

ing the Constitution, which envisaged the creation of the Supreme Judicial Council as the representative of the judiciary, was rejected by the Chamber of Deputies. However, the creation of the council is still on the agenda as the institution appears in the draft Law on the Courts and in the draft Law on Judges.

In Latvia there is no official representative body. The Conference of Latvian Judges, as a self-governing organization, discusses problematic issues of judicial practice and elects members of the Judicial Qualification Board<sup>52</sup> and the Judicial Disciplinary Board. Also, the Estonian judiciary has no constitutional representative of its own. The Supreme Court has no such authorization and the Association of Estonian Judges is an NGO with no constitutional standing. In Lithuania there is no constitutional representative of the judiciary either. Although not explicitly provided by law, it is the president of the Supreme Court who is perceived as the supreme representative of the judicial power and as the partner of Parliament and the executive.

#### 1.4.2

In Slovenia the function of representation is split between the Supreme Court and the Judicial Council on the constitutional level. The Supreme Court has the competence to elaborate and submit the budget of the whole judiciary to the executive. However, it is for the Judicial Council, a body of eleven members with six judges among them, to decide on the most significant personal and status issues affecting the judiciary and to comment and give "advisory opinions" to Parliament on the draft budget once submitted by the government.<sup>53</sup> This is a further example of the Slovenian approach of shared competencies and responsibilities. The minister of justice still has certain supervisory powers, but only over the administrative activity of court presidents. As indicated above, there have been attempts by the minister of justice to extend his or her competence to assessing and controlling the efficiency of the courts' operation, but the opposition of the Supreme Court, the Association of Judges, and the Judicial Council forced the government

52. The Judicial Qualification Board makes a recommendation to the minister of justice for the nomination of district and regional court judges and to the president of the Supreme Court for the nomination of judges to the Supreme Court. In addition, the board decides in which so-called "qualification class" the individual judge should be placed.

53. According to the decision of the Constitutional Court, the JC is not a formal representative of the judiciary. The JC is rather an autonomous (*sui generis*) body such as the Constitutional Court, the Court of Auditors, or the National Bank. Decision of the Constitutional Court, U-I-224/96, 22 May 1997.

to withdraw. A further reduction of the competence of the minister of justice and of the Justice Ministry is rejected even by the majority of Slovenian judges. This would result in the Judicial Council having to bear the full political responsibility for the operation of the courts and this, in their view, would present a constant danger to judicial independence.

#### 1.4.3

In Bulgaria, even in the absence of an explicit provision, the Supreme Judicial Council, composed of members of the judiciary, can be regarded as the body of representation. Similarly, in Poland the National Council of Judiciary to some extent plays the role of constitutional representative although no such status is assigned to it by the Constitution. In practice, representatives of the NCJ are invited to take part in the sessions of the parliamentary committees. The right of the NCJ to submit motions to the Constitutional Court in cases where statutory provisions may infringe judicial independence is a further indication of the NCJ's role as representative of the judiciary.

In Hungary the National Council of Justice has a similar status. The communication between Parliament and the NCJ is not extensive: the president of the NCJ (who at the same time is the president of the Supreme Court) reports annually to Parliament on the general state of the courts and on the administrative operation of the NCJ. The draft budget of the courts is also elaborated by the NCJ; however, the NCJ submits it to the government and not directly to Parliament.

### 1.5 Judicial Councils

#### 1.5.1

As can be seen from the overview, judicial councils with nationwide competence have been established in a number of countries and have taken over competencies previously exercised by the executive. The composition and powers of the councils vary considerably. On the one extreme we have the National Council of Justice in Hungary. Two-thirds of this council are judges: it is headed by the president of the Supreme Court and has fifteen members, nine of which are judges elected by their peers.<sup>54</sup> The way judicial representa-

54. The Supreme Court elects one delegate and the remaining eight judges are elected by the plenary sessions of judges organized on the county level. The NCJ has five permanent members who are not judges: the minister of justice, the general prosecutor, the president of the National Bar Association, and two members of Parliament.

tives are elected guarantees that the judiciary as a whole is represented in the NCJ. Following the court reform in 1997, the council took over all functions exercised previously by both the minister and the Ministry of Justice. Accordingly, the NCJ is in charge of all tasks related to the administration of courts and the selection, promotion, evaluation, and training of judges. It is for the council to elaborate the budget of the courts and to submit it to the government, in addition to legally representing the courts. Experience shows that the council in the course of its existence has been an effective protector of judicial independence. According to some critics, the operation of the NCJ is rather bureaucratic, resulting in the increase of the administrative burden of judges.<sup>55</sup> Some argue that it is actually the office of the council, composed of civil servants, that has the real power and not the council itself. Many of the employees of the NCJ office used to work at the competent department of the Ministry of Justice prior to the reform and their mentality still reflects the old times when courts were clearly subordinated to the bureaucracy of the ministry.

The Judicial Council in Slovenia has broad powers concerning personnel and status issues. However, the Supreme Court, not the council, submits the draft budget to the executive. The Judicial Council is composed of six judges elected by the judiciary and five members from among lawyers working outside the judiciary, elected by the National Assembly. The election of the members is organized in a democratic manner based on a public announcement for application published in the *Official Gazette*. The chairperson is elected by the members themselves. The election rules provide appropriate guarantees for the representation of judges at all levels.<sup>56</sup> Although elected by politicians, the "outside" members have not shown any signs of being politically motivated when voting in the council.

The National Judicial Council in Poland is composed of eighteen judges, four MPs elected by the Sejm, and two MPs elected by the Senate from among their own members. The minister of justice is also a member of the council.<sup>57</sup> The competence of the council extends to personnel and status

issues, such as reviewing applications for judicial posts and making recommendations to the president for the appointment and transfer of judges. In addition, the council has the competence to express its views on issues affecting the judiciary or the court system. A number of tasks which are performed in Hungary by the National Council of Justice—such as the supervision of the courts' performance via the control over the administrative activity of court presidents, the elaboration of the judiciary's draft budget, and organizing the training of judges—are, in Poland, within the competence of the Ministry of Justice.

The Bulgarian Supreme Judicial Council also has broad competencies: it determines the number of judges; draws up the draft budget for the judiciary and submits it to the government; makes the proposal to the president of the republic as to the appointment of the presidents of the Supreme Court and of the Supreme Administrative Court; and operates as the disciplinary authority. What is rather exceptional about the professional body is its authority to appoint and dismiss judges. As the appointing body, the Supreme Judicial Council also has the power to lift judges' immunity if requested by the general prosecutor. It should be recalled, however, that the council is the representative body of all three groups comprising the magistracy (judges, prosecutors, and investigators) and that these three branches elect only eleven members to the council. Another eleven members are elected by Parliament, whereas the president of the Supreme Court, the president of the Supreme Administrative Court, and the general prosecutors sit *ex officio* on the council.

The Superior Council of the Magistracy in Romania also acts as the disciplinary agency and makes nominations for judges' appointments to the president. A particular prerogative of the council is that it may invoke the Constitutional Court before the president of Romania promulgates a law. As indicated above, the council is composed of representatives of the judiciary (in the strict sense) and prosecutors. What is unique that out of the 3,665 Romanian judges, 3,123 do not have representatives of their own on the council.<sup>58</sup>

55. As concerns the evaluation of judges, for instance, the National Council of Justice elaborates the criteria but the extremely time-consuming evaluation itself is done by the judges.

56. Of the eleven members, six are judges and elected by the judiciary. Supreme Court judges, appeals court judges, and district court judges each elect one judge from among themselves, whereas two judges are elected by the entire judiciary.

57. Although not explicitly provided by the law, it has become the practice that the member of the council appointed by the president is also a judge.

58. 2,200 judges work on the local court level and 923 judges at the so-called tribunals, whereas the judicial members of the council comprise four judges from the Supreme Court and six judges from the courts of appeals. Also, the members from the prosecution service are selected on the principle of hierarchy: three prosecutors from the General Attorney's Office and three from the Prosecutor's Office at the level of the Bucharest Appeals Court.

## 1.5.2

The Council of Judges in Lithuania is composed exclusively of judges,<sup>59</sup> but has somewhat more limited competence. The council makes proposals to the president for the appointment, promotion, transfer, and dismissal of judges and elects the members of the Judges' Examination Commission. The Council of Judges, upon receipt of a complaint from a judge, assesses whether the constraint on a judge's activity or the court's operation constitutes a violation of judicial independence. The composition of the council guarantees that judges working at different levels are adequately represented.

## 1.5.3

The Council of Judges in Slovakia, being a purely advisory body, has a much lower status. The council has no official position in negotiations with the other branches. An amendment to the Constitution was passed in February 2001 and provides for the eventual creation of a National Judicial Council, pending implementing legislation.<sup>60</sup> The new council will have the authority to recommend candidates for judicial office and decide on judicial assignments. Budgetary power, however, remains in the competency of the Ministry of Justice; the council will only be able to issue opinions on the budget.

In the Czech Republic the amendment to the Constitution that had envisaged the establishment of the Supreme Judicial Council was rejected in Parliament.<sup>61</sup> According to the draft amendment, the council should have been composed of sixteen members, including the president of the Supreme Court, eight prominent Czech lawyers elected by both chambers of Parliament, and seven judges elected by their peers.

In Estonia there are discussions on the establishment of a National Judicial Council. Judges are supportive of the idea; the executive, however, seems to be against it.<sup>62</sup>

59. The executive may have some influence on the composition of the Council as both the president and the minister of justice may appoint two judges each to the Council.

60. Constitution, Slovak Republic, Art. 141(a).

61. It should be noted that the reason for the refusal to amend the Constitution and set up the Supreme Judicial Council might have been that no agreement could be reached in such sensitive matters as changes related to the status of the Czech National Bank and the Constitutional Court and on the Czech Republic's accession to the Statute of the International Criminal Court also envisaged in the amendment to the Constitution.

62. According to the plans, the NJC would be composed of representatives of the judiciary, the Parliament, the government, the Bar Association, and the law fac-

## 2. MATERIAL CONDITIONS

2.1 *The Budgeting Process*

## 2.1.1

The countries under review vary as to the body in charge of formulating the budget for the judiciary and allocating the judiciary's budget to individual courts. Elaborating the budget and submitting it to the government, as a general rule, is in the competence of the body that controls the administrative operation of the court system. Accordingly, where the Ministry of Justice has the control, such as in the Slovak Republic or in Estonia, it is up to the ministry to formulate the judiciary's budget, to allocate the resources provided by the adopted budget to the individual courts, and to supervise how resources are spent. This competence, of course, presupposes that the minister of justice also determines the number of judges at the individual courts and whether new posts are justified. In the countries where the minister of justice is in charge of elaborating the budget, courts do not form a separate category of the budget; their budget is included in that of the Ministry of Justice.

In Estonia there are separate line items within the ministry's budget for the courts of different levels, but whereas the courts themselves may not transfer from one budget category to another without amending the Law on the Budget, the minister of justice is free to transfer from one budget line to another. From Poland, on the contrary, it is reported that no transfers between budget lines are permitted without an amendment of the Law on the Budget. The Supreme Court has a privileged budgetary status in both countries as its budget constitutes a separate category.<sup>63</sup> In the Slovak Republic, on the contrary, only the Constitutional Court has a separate category. It is up to the minister of justice to distribute the available funds among individual regional courts and the Supreme Court.

A similar system existed in Lithuania prior to the ruling of the Constitutional Court in December 1999. The Court in that ruling proclaimed that judicial independence embraced, *inter alia*, financial independence of the courts from the executive. Financial independence also meant that financial allocations for each court had to be laid down in the budget and that the minister of justice had no power to determine how funds allocated to courts

ulty of Tartu University. The administration of courts would be operated by the permanent executive body of the council.

63. The Supreme Administrative Court and the Constitutional Tribunal have separate budgets in Poland.

should be used.<sup>64</sup>

### 2.1.2

Where judicial councils with nationwide competence are in charge of exercising administrative control over courts, the council in one way or another is involved in the budgeting process. Thus in Hungary, the National Council of Justice is vested with the responsibility for drafting the budget and submitting it to the government. The government is not bound by the council's draft, but in case of deviation from it, the government has to give detailed information on the original draft and present to Parliament the reasons for the deviation.<sup>65</sup> As reported, this provision of the Law on the Organization and Administration of the Courts is not completely observed in practice, since the government simply submits both the council's and its own version to Parliament without giving reasons for the differences.

In Bulgaria, the draft budget of the judicial branch is drawn up and submitted to the government by the Supreme Judicial Council. The Bulgarian Constitutional Court held that the executive has no power in the process of drafting the judiciary's budget: it is obliged to incorporate the council's proposal in the draft state budget and submit it to the National Assembly. The government may formulate its own proposals and objections but may not alter the draft budget elaborated by the council.<sup>66</sup> In practice, however, the government submits two versions of the judiciary's budget to Parliament—its own and the one elaborated by the council—and Parliament tends to adopt the government's version, which is lower. As a result there was no budgetary increase in 2000 although new functions assigned to the courts would have justified the creation of new judicial posts.

In Slovenia the National Council of Justice and the Supreme Court share the responsibilities for budgetary issues. Based on the information and requests submitted by the presidents of the individual courts, the Supreme Court prepares and submits the budget to the government. However, when it comes to the debate over the judiciary's budget in Parliament, the Supreme Court representatives of the Judicial Council (and of the Slovenian Association of Judges) also participate in the sessions of the competent parliamentary committee.

The Romanian regulation is unique in that the Superior Council of Magistrates is not involved in the budgeting process. It is the responsibil-

ity of the minister of justice to elaborate the budget of the judicial authority after collecting requests from the court presidents. The transfer of funds from one budget line to another without an amendment of the Law on the Budget is also permitted, though only under exceptional conditions and only in the second half of the year.<sup>67</sup>

There is no evidence supporting the assumption that the Bulgarian, Slovenian, or Hungarian model guarantees a more effective representation of the judiciary's material interests. In all these countries, courts and judges are left without representation at the crucial stage when the budget is discussed in the cabinet. From Slovenia it is reported that it is completely up to the minister of justice to what extent he or she gets involved in the debate over the courts' budget. In 1998 the minister's lack of participation in the negotiations almost resulted in the collapse of district and regional courts. In Hungary, like in Bulgaria, the proposal submitted by the government is considerably lower than that prepared by the council, and the government does not take its duty seriously according to which it should give a detailed explanation for the difference. In addition, there are several opportunities for the government to award or withdraw financial resources.

## 2.2 Work Conditions

In most countries, judicial salaries have been increased to varying extents over the last few years with the result that the judicial post has become more attractive than it was prior to the change in the political regime. The conditions under which judges perform their duties, however, are still poor and do not correspond to the dignity of the judicial office. It seems that the new democracies have failed so far to remedy the under-investment of the four decades of Communism. There are, however, considerable differences not only among countries but also among courts in one single country. In Slovenia, work conditions are acceptable, while from the Slovak Republic and Latvia<sup>68</sup> extremely miserable conditions are reported. It seems that judges of large courts work under conditions that are below the average standards. In Poland only judges of smaller courts have their own offices; the level of computerization is also lower at the large courts. In Latvia, the Riga Regional

64. Decision of the Constitutional Court of 21 December 1999.

65. Act 66 on the Organization and Administration of Courts, 1997, Art. 39(b).

66. Judgment of 16 December 1993, *State Gazette*, No. 1 (4 January 1994).

67. For the transfer, the approval of the Ministry of Finance is required. Transfers can also be made through an amendment of the state budget law by Parliament or through the government's emergency decree.

68. In Latvia not even the Supreme Court has a library or adequate recording equipment.



Court is faced with extreme difficulties, just as is the Central District Court in Hungary and the courts in Ljubljana.

As to computerization, considerable improvement has been made, but compared with government offices courts are still under-equipped in most countries. Courts higher in the hierarchy tend to have more technology. In Latvia, all Supreme Court justices have their own computers, and several regional and district courts are computerized, though some of the latter have only a single computer.

### 3. SELECTION, TENURE, PROMOTION, REMOVAL

#### 3.1 *The Selection Process*

##### 3.1.1

In the countries under review it is generally the president who appoints judges. In both Poland and Hungary, the National Judicial Councils make the proposals for appointments. In Latvia and Slovenia, on the contrary, it is within the competence of Parliament to elect judges. Whereas in Slovenia the Judicial Council makes the nomination, in Latvia nomination is the prerogative of the minister of justice. Parliament has no obligation to give reasons for refusing to accept the nomination and in both countries it is reported that Parliament has rejected a candidate, for what is most likely political considerations and not because of the candidates' professional abilities. In Slovenia it has therefore been proposed to oblige Parliament to provide reasons for its negative decision.<sup>69</sup> In Estonia, Parliament from time to time refuses to appoint to the Supreme Court judges who had links to the opposition. It should be stressed, however, that the Estonian Supreme Court performs the functions exercised in other countries by the constitutional courts that are placed outside the ordinary court system and whose members are appointed or elected after political negotiations.

In many countries, supreme court justices are appointed or elected under a procedure different from that of other judges. In Estonia, other judges are appointed by the president, but Supreme Court judges are appointed by Parliament upon the proposal of the chief justice of the Supreme Court. The chief justice is also elected by Parliament, but upon the proposal of the

president. In Hungary it is only the president of the Supreme Court who is elected by Parliament.

The typical way to become a judge is to apply for a judicial apprenticeship after completing legal studies. In Poland, candidates for apprenticeship are selected on the basis of a competition (the rules of the competition are determined by the minister of justice). The status of court apprentice resembles that of civil servants: they are employed and dismissed by the court presidents (in Poland by the president of a court of appeals). The amount of time judicial candidates have to serve as apprentices varies from two to three years (two years in Latvia and Hungary, two and a half in Poland—where part-time court apprenticeship is also practiced). During this time candidates, in addition to performing the work assigned to them, normally have to attend courses that prepare them for the qualification exam. In Poland and Latvia the qualification exam is given by bodies composed exclusively of judges (in Poland by examination commissions, in Latvia by the so-called Qualification Board). In Hungary attorneys, prosecutors, and judges all have to take the same exam, therefore the composition of the examination commissions is also mixed.

Candidates who pass the qualification exams are not appointed immediately to judicial posts in all of the countries; they first have to prove their qualities as court assessors (court secretaries). In Poland, the maximum term candidates may work as assessors is three years, after which the individual either has to be nominated for appointment as a judge or his or her employment has to be terminated. In Hungary only a minimum term is set; candidates may not be appointed to a judge's post prior to having served one year as a court secretary.

In countries where court assessors may immediately be appointed as judges after successful completion of the qualification exams, a certain "probationary period" is inserted. In Latvia, judges are first appointed for a period of three years. After this, Parliament may appoint the judge for another two years or for life. It is the minister of justice who proposes whether to appoint the judge for life or only for two years, and it is the opinion of the Judicial Qualification Board that serves as the basis for the minister's proposal. The case in Estonia is similar, where judges within three years following their appointment can be dismissed if the Judges' Examination Commission finds that the judge is not fit for the judicial post. The official explanation is that the probationary period is needed for finding out if the judge is able to perform the tasks assigned to him or her. In Bulgaria judges become irremovable only upon completion of three years of service. In the Slovak Republic, upon the recommendation of the government, the National Council elects judges

69. It should be noted that the Latvian report refers to the election of judges of the Constitutional Court, which is outside our review. From Slovenia it is reported that Parliament's refusal, which might have been based on political considerations, concerned candidates for posts at the Supreme Court.

first for a four-year probationary period, after which judges are appointed for life.<sup>70</sup> In Lithuania the probationary period is five years for district court judges. It seems that appointment for a definite term in most countries is seen as a necessary means of screening out individuals unfit for judicial office and not as a threat to judicial independence.<sup>71</sup>

The Hungarian regulation is unique in that before being appointed, candidates have to serve as secretaries and are then first appointed for three years. In Romania the law differentiates between judges who graduated at the National Institute of the Magistracy and those who did not. The latter are appointed first for a probationary period of two years and have to pass an exam before being appointed for life. It should be noted that Supreme Court judges in Romania are appointed for a (renewable) term of six years, which is perceived as a considerable restriction on independence, opening doors for improper influence.

### 3.1.2

As can be seen from the overview, bodies composed exclusively of judges play a dominant role in the selection process; however, the executive (the minister of justice) still has certain powers. This is not the case in Hungary, where the executive has no power at all. It is completely in the hands of judicial bodies to assess candidates: it is the National Council of Justice that determines the selection criteria and makes nominations to the president of the republic. In Bulgaria, where the Supreme Judicial Council appoints judges, it is *de facto* the court presidents who conduct the selection process.

The rest of the countries under review vary according to the extent to which the minister of justice may influence the selection and appointment process. The minister's position in this respect is relatively weak in Poland: his or her role is confined to setting the criteria for the competition of candidates for judicial apprenticeship and for the judicial exam; the assessment of candidates' performance is done by judges. In addition, the proposal for appointment addressed to the president is made by the National Council of the Judiciary via the justice minister who may give his or her opinion on the candidates. However, the minister's opinion is not binding; i.e., the minister serves rather as an intermediary. The minister also has the right to propose his or her own candidates to the National Council after consulting the colleges of the relevant courts. In this case again it is up to the council to put forward the proposal to the president. Somewhat similar is the justice minister's com-

70. The nomination is made by again the government.

71. Only the report on the Slovak Republic refers to the threat to independence.

petence in the selection process in Slovenia. It is for the so-called personnel councils to form an opinion on candidates, but the minister of justice also has this right and the opinions of both the councils and the minister is forwarded to the Judicial Council. The Judicial Council makes the proposal to the National Assembly. As reported, the minister's opinion has never contradicted that of the personnel councils.

In Latvia it is up to the minister of justice to nominate candidates; however, the basis of the recommendation is the assessment of the candidate by the Judicial Qualification Board. In the Czech Republic as well, the minister of justice has a strong position in the selection process. It is completely up to him or her to nominate candidates and judges' promotions depend solely on the decision of the minister.

### 3.1.3

In some of the countries the selection process is sufficiently transparent and selection criteria are objective. This seems to be the case in Poland, Hungary, and Slovenia. In Poland detailed criteria are elaborated and the selection process used by the Judicial Council for nominating candidates to Parliament for election is also transparent. Candidates who are not nominated may invoke the Administrative Court for review. In Bulgaria, on the contrary, due to the lack of clearly defined criteria and competitive examination, the present system is perceived as problematic and it is feared that the Supreme Judicial Council is not in a position to properly exercise one of its most important functions, i.e., the appointment of judges.

## 3.2 Tenure, Retirement

### 3.2.1

Permanent tenure of judges is envisaged in all countries and is perceived as an essential guarantee of independence. In Slovenia, however, several members of Parliament started to question the rationale of permanent tenure and even submitted a proposal to amend the Constitution aimed at abolishing it. According to the author of the proposal, judicial backlogs were to be attributed to the judges' permanent term, which, in the MP's assessment, was not counterbalanced by adequate mechanisms of judicial accountability. Due to criticism of the proposal, Parliament did not start the procedure for accepting such an amendment. In numerous countries, as outlined above, judges are first appointed for a limited term before being appointed for life. It seems that appointment of young judges for a definite term is not perceived as a threat to judicial independence but rather as a legitimate means of remedy-

ing the deficiencies of the recruitment mechanism by which individuals unfit for the judicial post cannot be screened out. Slovenia is the exception: there it is held that the constitutional provision according to which "the office of the judge shall be permanent" would prohibit a probationary period for judges.

Judges appointed for a certain period of time are temporary judges who do not have the same protection of their position as permanently appointed judges. Therefore the community may legitimately fear that apart from the facts of the case tried by them, temporary judges may be influenced by other considerations.<sup>72</sup> Therefore, clear and strict admission criteria, appropriate training of individuals entering the judiciary, and strict rules of accountability should be employed for guaranteeing high quality performance and not the institution of a probationary period, which poses a threat to judicial independence and impartiality.

### 3.2.2

The countries under review also vary regarding the permission for judges to work after the completion of the statutory retirement age. No such extension is permitted under Slovenian law: judges have to retire at age seventy. In Poland, on the contrary, where the retirement age is sixty-five, the National Judicial Council may authorize judges to work until the age of seventy. Also, in the Czech Republic, at the age of sixty-five the judge "may be released of the judicial function," i.e., does not have to retire. In Latvia judges may be permitted to continue after reaching retirement age, which varies according to the position of the judge within the hierarchy: the retirement age for district and regional court judges is sixty-five, for judges at the Supreme Court, seventy.<sup>73</sup> In Bulgaria no specific retirement age for judges is determined; after reaching the general retirement age judges, with the authorization of the Supreme Judicial Council, can continue working. However, after the judge has reached retirement age the minister of justice and the president

72. It is for this reason that the Norwegian Supreme Court held that temporary judges were incompetent to adjudicate on certain disputes to which the state or any of its organs were parties. As the Court said, it is especially important that the law-seeking public have full confidence in the individual judge making his judgment without having to consider any negative consequences for his position. The judges' irremovability is therefore fundamental for the trust that the law-seeking public can have in their objectivity. See Commission on Human Rights, Fifty-fifth session, ECOSOC E/CN.4/1999/60, 13 January 1999.

73. In Romania the retirement age is further differentiated: it is 65 years for local court judges and for judges at the tribunals, 68 for judges at the courts of appeals, and 70 for Supreme Court justices.

of the respective court may propose the judge's dismissal without giving any reasons. It is the present practice of the SJC to give the opportunity for the judge to present his or her views and not to follow the minister's proposal if this is not based on objective considerations.

In most countries judges may be permitted to continue after reaching retirement age. If judges' living standards drop dramatically following retirement, the possibility of extension may present a genuine threat to judicial independence, particularly in the lack of precisely defined criteria for continuation. This seems to be the case in Bulgaria where, as outlined, the proposal for dismissing the judge after reaching retirement age does not have to be supported by reasons and where judges are under pressure to continue work after reaching retirement age since the amount of the pension is very low.<sup>74</sup>

### 3.2.3

As a general rule, judges may not be transferred from one court to another without their consent except if they are transferred for a definite period of time as a disciplinary sanction.<sup>75</sup> The terms vary considerably from country to country: in Romania, judges may be transferred for a maximum term of three months, whereas in Bulgaria transfer as a disciplinary sanction may be imposed even for three years. In addition to transfer as a disciplinary measure, judges may be assigned to another court if for reasons of reorganization of the court system the unit they used to serve ceases to exist. Hungary seems to be the exception as judges, if so required by "the interests of the administration of justice," may be transferred to another court once in every three years for a maximum of one year, by a decision of the National Council of Justice.<sup>76</sup>

It is the responsibility of the appointing or electing body to make a decision regarding the removal of a judge. Judges may be removed in case they are found guilty of having committed a criminal offense,<sup>77</sup> if they have seriously

74. A draft amendment to the Law on the Status of Judges aims at bringing judges to the level of civil servants. For the time being judges have to make their own contribution to both the social and the health insurance schemes (only part of the contribution is covered by the budget of the judiciary), whereas contributions for civil servants are covered entirely by the state budget.

75. In Lithuania, in the case of a judge's lengthy illness, the president upon the proposal of the minister of justice may assign his or her duties to a judge working at another court.

76. Act 67 on the Legal Status and Remuneration of Judges, 1997, Art. 17.

77. In most countries only conviction for an intentional criminal offense may result in the judge's removal. In Bulgaria and Hungary judges may be removed only if sentenced to imprisonment.

breached their obligations, or if for health reasons they are permanently prevented from performing their duties.

### 3.3 *Evaluation and Promotion*

#### 3.3.1

The judicial posts in the countries under review are filled by career judges. As a general rule, judges start at the lowest level of the court system and are gradually promoted. As a result of the hierarchic structure in most countries, there exist numerous ranks and titles and corresponding salary categories. There are, however, considerable differences among countries as to the precision by which criteria for assessing judges' performance are defined. In Bulgaria, where judges are eligible for promotion every third year, the only precisely determined criterion is that judges simply have to serve this term in order to be promoted to the next rank. The Law on the Judiciary lists "high professional qualification and exemplary performance" as criteria.<sup>78</sup> Since promotion is not automatic, the lack of clear additional criteria involves the risk that promotion will depend on considerations other than high-quality performance.

Like in Bulgaria, in Latvia the only criterion for promotion is the term to be served. Promotion to a higher "qualification class" (there are six such classes) is made by the Judicial Qualification Board—which is composed of ten judges of whom four are judges of the Supreme Court—upon the proposal of the minister of justice. (In the case of promotion to the Supreme Court the chairperson of the Supreme Court makes the proposal.) No clearly formulated criteria are set for the assessment of judges' performance, like in Estonia, where criteria for promotion are also lacking. No distinction is made between promotion within the court the judge serves and his or her promotion to a higher court. Accordingly, the president of the republic appoints judges to the circuit appellate courts and Parliament appoints to the Supreme Court. The Supreme Court has a central role to play in promotions and appointments as it makes the proposal to the president, whereas in the case of candidates to the Supreme Court it is the Court's president who submits the proposal to Parliament. As to the assessment of judges' performance in practice, both the number of cases completed by individual judges and the rate of reversal by higher courts are used. Although it is reported that promotion and assessment are in most cases made on objective criteria, such as the judge's integrity, ability, and experience, the lack of clear standards involves the risk of arbitrary decisions.

78. Judicial System Act, Art. 142.

With the adoption of the new Act on Judges and Lay Judges in the Slovak Republic, the promotion procedure has been significantly improved.<sup>79</sup> Previously, there were no fixed rules for promotion and assessment; only quantitative criteria were set for evaluating judges' performance. Promotions were in the competence of the court presidents. According to the new law, all judges are evaluated every five years, as well as during any selection procedure. The evaluations are carried out by court presidents on the basis of reviews of the judge's decisions and opinions by appellate courts. While clearer standards have been set, the evaluation and promotion competence still remains primarily in the hands of the court presidents, who are appointed by the minister of justice.

In Romania criteria for assessing judges' performance seem to be rather clear and detailed. First, time served as a judge is the precondition for being promoted. (For appointment as a district court president, four years are required; for the president of an appeals court, eight years service is required.) What is interesting is that no quantitative measure of performance is set. Judges are evaluated yearly; the reversal rate is not a central criterion of performance, but if exceptionally high, may prevent promotion. Decision on promotion and the assessment of judges' performance is made by the Superior Council of the Magistracy.<sup>80</sup>

In Lithuania, evaluation of judges is conducted by the court presidents on the basis of extremely detailed quantitative and qualitative criteria and is submitted to the Departments of Courts of the Ministry of Justice, which makes the overall assessment of the performance of the judiciary. One of the primary criteria is the ratio of judicial decisions found "lawful" by higher courts; i.e., the reversal rate is an important indicator of judges' performance. (It is not quite clear why the number of acquittals and verdicts of guilt are collected separately.)

In Hungary the system introduced as part of the overall judicial reform in 1997/1998 guarantees the objective evaluation of performance and provides for sufficient guarantees for judges under evaluation. According to the Law on Judges' Status and Compensation, the regular assessment of judges' performance should be made three times: first, before the judges' appointment for life and then after six years and twelve years.<sup>81</sup> The evaluation is made on

79. Act 385/2000 on Judges and Lay Judges.

80. Law on the Judiciary, Art. 66.

81. The law also envisages extraordinary evaluation. This can be made either on the request of the judge or if the process for declaring the judge unable to perform his or her functions is initiated.

the basis of reviewing a great number of cases (not less than fifty) completed by the judge. The evaluation extends to the observance of substantive and procedural law as well as administrative regulations. The criteria of the assessment of the judges' performance are elaborated in detail by the NCJ. The evaluation is ordered and its result is signed by the president of the court,<sup>82</sup> but the president may authorize other judges in leading positions to carry out the actual evaluation. The evaluation has to be made in writing but is also communicated orally. The judge under evaluation may make comments either orally or in writing. As a result of the evaluation the judge may be qualified as "outstanding," "suitable," or "unsuitable." In case of obtaining the lowest grade the judge has the right to invoke a court.

### 3.3.2

It is evident that well-trained, knowledgeable, and skillful judges are in a better position to resist attempts of undue influence than their incompetent colleagues. That is why it is of utmost importance that judges are provided with all documents needed for the performance of their duties, an issue addressed in the part of the summary report on work conditions. Regular training of judges is guaranteed at a minimum level in all countries. From Estonia it is reported that the amount allocated to training of judges and prosecutors in the budget (around 170,000 Euro) is clearly insufficient considering the immense need for training under conditions of permanent and fundamental changes in the legal system. In Lithuania, funding for training also seems to be insufficient and is permanently decreasing. In Lithuania, like in Latvia, judicial training centers were set up primarily with foreign support. In Latvia, the Judicial Training Center is a non-profit organization established by the Latvian Judges Association, ABA/CEELI, the UN Development Program, and the local Soros Foundation. Apart from foreign funding, the Ministry of Justice also contributes to the operation of the center. According to the present plans, the Ministry of Justice will transfer the competence of training judges to the center. Serious concerns as to future funding are reported from Lithuania. External funding allocated for the training center was exhausted by the end of 2000, and at that time no further sources to ensure sustainability and operational viability had been identified.

82. The evaluation of district court judges and county court judges is ordered and made by the presidents of the competent county courts. The presidents of the regional courts evaluate judges at the regional courts and the president of the Supreme Court evaluates the Supreme Court Justices.

## 3.4 DISCIPLINARY OFFENSES, PROCEDURE AND SANCTIONS

### 3.4.1

Laws on judicial conduct generally put the obligation on judges to refrain from conduct likely to compromise the dignity of the judicial office. The countries under review vary as to the degree of precision by which conduct that may result in disciplinary sanctions is defined. It seems that in Slovakia there are no detailed rules on what constitutes a disciplinary offense. Undue delays in the performance of duties, conduct within or outside office damaging the judiciary's reputation, or grave disregard of deadlines for delivering judgments as listed in the Bulgarian Law on the Judiciary<sup>83</sup> are typical for other countries as well.<sup>84</sup> The Law on Judicial Service, in addition, requires that judges not disclose certain information about the parties, not express themselves on matters under adjudication, and not accept gifts in relation to their work. Even more detailed is the Romanian Law on the Organization of the Judiciary listing frequent delays, unjustified absence from work, interference in the activity of another judge, frequent negligence, disclosure of rules on secrecy, unjustified denial of performing office work, and other forms of conduct as constituting a disciplinary offense. Like in all countries where judges are not permitted to be members of political parties or to be involved in political activities, the violation of the ban constitutes a disciplinary offense in Romania.<sup>85</sup>

### 3.4.2

The Romanian regulation is unique in that the Law on the Organization of the Judiciary explicitly states that grave violations of the rules of the Magistrates' Code of Ethics also qualify as a disciplinary offense. The Code of Ethics thus acquires an official status, which is not the case in the other countries. In Latvia, the Judges' Association adopted a code of ethics in 1995, which, however, is not applied in practice. In Estonia, the Association of Judges (an NGO) adopted the Judges' Rules of Behavior but it has no official status. Similarly, the code of ethics adopted by the Association of Slovak Judges is binding only informally on those judges who are members of the association.<sup>86</sup> The drafting and the adoption of such codes is advocated in countries

83. Judicial System Act, Art. 168.

84. In Lithuania, negligence in work, the perpetration of an administrative infraction (petty offense), and conduct discrediting the judicial office or the court are included.

85. Law on the Judiciary, Art. 122, 118.

86. The Association submitted the code of ethics to the judicial councils for approval in 1999, but according to the report, no council has adopted the code so far.

that have no codes of judicial ethics. In the Czech Republic there have been discussions and even several drafting initiatives within the Czech Union of Judges, but no written code of ethics has been adopted so far. This is the case in Hungary as well, where the National Council of Justice is considering the drafting of a code of ethics for judges. Similarly in Slovenia, it is felt that the principles listed in the Law on Judicial Service that should guide judges and on which there is overall agreement are not sufficient. Therefore, the drafting of a code of ethics binding all members of the Slovenian Association of Judges with real and hypothetical situations is recommended. Since a number of terms in laws on judicial conduct are broadly formulated, codes of ethics may give judges detailed instructions on how to interpret them. For example, the notion of political activity prohibited in the overwhelming majority of countries needs further specification. Similarly, codes of ethics may advise judges as to what types of teaching activities, which judges are generally permitted to perform, are incompatible with the judicial office.<sup>87</sup>

### 3.4.3

In theory, the lack of clearly formulated rules of conduct involves the risk of arbitrary prosecution of judges for disciplinary offenses. This is, to some extent, counterbalanced by procedural safeguards. In most countries, judges under investigation have the right to present their arguments at oral hearings; they may be assisted by counsel and appeal against decisions of the disciplinary body. In a number of countries the rules of criminal procedure with all the safeguards protecting defendants apply to disciplinary proceedings. However, in practice it is not unfounded accusations and arbitrary disciplinary proceedings that may raise concerns but rather the reluctance of the disciplinary bodies (composed in most countries of fellow judges) to find judges under investigation responsible for disciplinary offenses. In addition, the lack of transparency of disciplinary procedures may harm the reputation of and contribute to the public's distrust of the judiciary. Accountability should not be seen as a threat to judicial independence; on the contrary, the failure to enforce rules of conduct, especially if coupled with low performance, may jeopardize independence in the long run. The lack of a more self-critical approach, as rightly stated in the report on Slovenia, may provoke the other

87. From Slovenia it is reported that judges are giving lectures for considerable compensation at conferences organized by public and private enterprises, i.e., by those who may become parties in future cases. Therefore, it is suggested to clearly state that judges may receive honoraria only for lectures they give at law schools or at workshops and conferences organized by professional associations.

branches to attempt to abandon certain guarantees of judges' independence. Even if the situation in Slovenia is unique in that no judge has been found guilty of a disciplinary offense so far,<sup>88</sup> the fear that the judiciary's reluctance to effectively prosecute its members may provoke measures curtailing the courts' independence is justified, in regard to other countries as well.<sup>89</sup>

## 4. INTRAJUDICIAL RELATIONS

### 4.1 *The Role of Higher Courts*

#### 4.1.1

Like in civil law countries in general, the uniformity of judicial decisions is highly valued and is enforced through various mechanisms in the countries under review. First, there exists a comprehensive system of appeal. Appeals courts, as a general rule, review the judgments brought before them in full; i.e., they check whether the facts have been correctly established and whether the inferior court made an adequate legal assessment of the facts. As a result of the review, appeals courts may confirm, amend, or annul the judgment. In the latter case, the appeals court remands the case to the lower court for retrial. The Czech Republic represents the exception: as of 1 January 2001, the system of full appeal was replaced by the partial appeal system. In the Slovak Republic full appeal is the general rule; in administrative cases, however, only the legality of the decision of the lower instance can be reviewed.

When annulling the judgment, the reasoning of the decision of the appeals court serves as a guide for a new trial. In addition, appeals courts in most countries may give instructions on how to proceed when retrial is ordered. This is not the case in Estonia and Lithuania, where it is solely the reasoning of the appellate court that has to be considered in the course of retrial.

In countries where appellate courts may give instructions in the case of retrial there are differences as to the degree to which judges are bound to the instructions. In Poland, the appellate court in the decision overturning the judgment of the lower court indicates "the direction in which changes are to

88. One reason might be that judges through voluntary resignation or retirement may avoid condemnation. Also, Hungarian law provides for judges the opportunity to leave their office with dignity.

89. In some of the countries the number of disciplinary proceedings is increasing. This is the case in the Slovak Republic; however, disciplinary courts tend to apply only slight disciplinary sanctions.

be introduced." The Code of Criminal Procedure in Romania provides that the court to which the case is remanded for retrial is bound to the facts established in the appellate court's decision but is free in the legal assessment of the facts. In the Czech Republic the court of appeals may order that certain additional evidence be collected and assessed by the court to which the case is returned and may also give instructions as to the legal assessment of the facts. In Bulgaria it is solely the interpretation of substantive law provisions given by the appellate court that is binding upon the lower court.

In a number of countries, the court of appeals may also order that the case be retried by a different panel. This competence of the court was extended to civil cases in the Czech Republic in 2001. In Hungary, the court of appeals, in addition to ordering retrial by a different panel at the same court, may under exceptional conditions rule that the case be reconsidered by a different court.

#### 4.1.2

Following from the hierarchic structure of the court system and from the emphasis put on uniformity, the rate of reversal is either openly or covertly an important factor in the evaluation and promotion of judges. It is general practice to obtain the opinion of higher court judges before a judge is promoted to that court. Therefore, one would expect the existence of informal mechanisms by which compliance with the higher courts' expectations is secured, in order to avoid annulment through the appeal process. However, the reports indicate the lack of such informal mechanisms or at least state that they are not officially acknowledged. In the countries under review the institution of "mentors," i.e., judges from higher courts who guide the work of their colleagues at lower courts, is unknown. In the Czech Republic direct consultation with superior courts in specific cases is not permitted. No such practice exists in Estonia or Poland, either. In the majority of countries there is no such explicit prohibition, and as reported from Hungary and Lithuania, lower court judges sometimes contact superior court judges in concrete cases they perceive as difficult. In Romania, higher courts may not give lower court judges instructions regarding a case apart from deciding on appeal; nevertheless, such instruction is sought by lower court judges on a regular basis by way of consultation with a higher court judge. However, in all countries, workshops and consultations on specific issues of interpretation without reference to concrete cases are more typical.

As mentioned above, higher court judges are, as a general rule, consulted before their colleagues are promoted to their court. This might be an incentive for judges to follow the jurisprudence of higher courts. In Estonia, a

considerable part of high-court judgments are accessible on the Internet. In Hungary, county courts started to publish their most important decisions, by which, in effect, the monopoly of the Supreme Court to interpret legislation was broken.

#### 4.1.3

In order to guarantee uniformity in decision-making in the countries under review supreme courts play an important role, although in some of them this is perceived as running counter to the constitutional provision guaranteeing judicial independence.<sup>90</sup> In Bulgaria, the Constitution maintained the provision inherited from the Communist era, according to which the Supreme Court "provides for the supreme judicial oversight as concerns the precise and uniform application and interpretation of laws."<sup>91</sup> Accordingly, the Supreme Court delivers interpretative judgments, which are binding upon the courts and the executive.<sup>92</sup> In Latvia, as well, the Plenary of the Supreme Court adopts binding interpretative decisions on how to apply the provisions primarily of civil and criminal law. In Hungary, the Law on the Organization and Administration of Courts maintained the institution of "decisions on issues of principle," which are to be published in order to secure that laws are applied in a uniform manner. It also introduced the so-called uniformity decision, which is issued if necessary for the development of judicial practice or for ensuring uniform application of laws or if a chamber of the Supreme Court intends to deviate from the case law established by the Supreme Court's other chamber.<sup>93</sup> In Lithuania, judgments of the Supreme Court serve as precedents; i.e., courts have to follow the interpretation of provisions of law set forth in the Supreme Court's judgment in cases where the facts are similar. At this point, however, it should be noted that in Lithuania judges are encouraged to be involved more actively in interpreting laws, as numerous legal provisions dating back to Communist times are still in force and new legislation requires systematization.

90. See, for instance, the report on Latvia.

91. Constitution, Republic of Bulgaria, Art. 124.

92. In administrative cases the same competence is exercised by the Supreme Administrative Court. Constitution, Republic of Bulgaria, Art. 125.

93. Act 64 on the Organization and Administration of Courts, 1997, Arts. 27, 30–32.



## 4.2 Case Management and Relations with Court Presidents

### 4.2.1

The authority charged with the administrative supervision of courts also has the task of setting standards of caseload. Both in Slovenia and Hungary, the Judicial Councils determine the norms for caseloads; the Hungarian National Council of Justice confines itself to setting the number of trial days per week and per year.<sup>94</sup> In the Czech Republic, the Ministry of Justice sets the norms of caseload by determining the number of the different types of cases (civil, criminal, child custody, etc.) that have to be handled by judges each month. Ensuring compliance with the established norms is in the competence of court presidents.

As to the position of court presidents and the degree to which individual judges depend on them, there are quite considerable differences among the countries under review. Slovenia is unique in that the court president is rather a *primus inter pares*; judges are not dependent on court presidents in obtaining due benefits or promotion. The relative weakness of the position of court presidents in Slovenia is indicated by the fact that a number of decisions affecting judges' work, such as the allocation of judges to different fields or activities, which balance the caseload assigned to judges, are passed by personnel councils, the president having only the right to make proposals. From Lithuania it is also reported that judges are not dependent on court presidents, who have no power to interfere with the way judges deal with cases. From the Czech Republic, on the contrary, it is reported that judges are largely dependent on the court presidents with regard to assignment of cases, obtaining suitable office space and equipment, their assessment, etc. The situation is similar in Bulgaria: court presidents assign cases to individual judges; they have the right to inform the Inspectorate of the Ministry of Justice of the progress of cases dealt with by individual judges; they assess judges' performance for promotion and may initiate disciplinary proceedings. Surprisingly enough, court presidents are appointed for an indefinite term. With respect to their strong position and the potential for abuse, the idea of introducing a term of office has been raised so that court presidents would not consider the post permanent.

### 4.2.2

There is an encouraging development in some countries regarding the assignment of cases to individual judges. It has been realized that random assign-

94. According to the ruling, judges should be allocated at least two trial days per week and a minimum of 80 trial days per year.

ment is a guarantee of judges' impartiality and independence. In Slovenia and Lithuania random assignment is already the rule; in Latvia the Ministry of Justice has established a computer-based system of case allocation. In the Czech Republic, on some occasions the media pointed to cases that were decided "extremely quickly" as compared to other cases in the court's register. This aggregated the suspicion that these cases were expedited because the judge involved in the case took a bribe. In response, a system of random assignment was introduced through the distribution of special software designed to achieve this.

In Hungary, the ruling of the National Council of Justice only requires that the individual courts establish certain rules governing the allocation of cases. It is for the court presidents to determine the manner of case assignments and some of them have introduced random assignment. Also, in Slovakia, some court presidents introduced random assignment in order to avoid subjectivism in case allocation. However, the overall system is not transparent: there is room for judge shopping or case shopping by bribing the officials in charge. As reported, by assigning certain types of cases, such as cases of defamation, to the same judges, court presidents may ensure that court decisions meet the expectations of one or another political group. No elaborate and transparent system of assignment exists in Bulgaria and Romania either. In both countries it is in the discretion of court presidents to decide how cases are allocated to individual judges. The assignment of the case to an individual judge may actually be a deciding factor in the outcome of the trial. As reported from Romania, by assigning cases related to restitution of nationalized property to particular judges, court presidents may manipulate the outcome.

## 5. ENFORCEMENT OF COURT DECISIONS

Part of the notion of the independence of the judiciary is the government's inability to abolish the institution or replace it with something else. But this aspect of independence (sometimes called fundamental independence) also implies that the "product" of the judiciary's operation, i.e., decisions of individual judges, is not disregarded. Institutional and decisional independence lose their practical significance if decisions once given are ignored by the government and those affected by the decision.

It is promising that there is no systemic reluctance on the side of government to comply with the judgment of the courts. However, it is extremely disquieting that the enforcement of judicial decisions is reported to be an extremely pressing problem in almost all countries. From Latvia it is

reported that seventy percent of civil judgments are not enforced in practice. Enforcement in Romania often takes a very long time and, as reported, corruption of persons in charge is notorious. Problems have been reported from the Czech Republic and Poland in the area of enforcement of civil judgments, whereas judgments in criminal cases in both countries are implemented effectively. In Hungary, the lack of efficient execution of judgments concerning property rights presents the most serious problem. Parties often suffer severe losses either because of delays or because decisions are not executed at all. In addition, judges sometimes complain that the police simply fails to implement their orders to find defendants who, in spite of being summoned by the court, fail to appear.

In most countries, decision-makers seek to remedy the problems related to the execution of court judgments by organizational reform or by changing the Law on Execution. In the Czech Republic an amendment to this effect came into force on 1 January 2001;<sup>95</sup> an amendment to the Law on Court Bailiffs is being prepared in Poland. In Romania, the Ministry of Justice has expressed the intention to amend the present provisions on enforcement of the civil procedural code and to draft a law privatizing the judicial enforcement sector. However, the experience of Hungary and Slovakia, where the reform of the bailiff system has only alleviated the problem without resolving it, should make decision-makers aware of the need to take measures that build public trust and confidence in the judiciary.

## 6. SUMMARY

### 6.1

At the end of the paper I wish to draw the conclusions I find most important from the survey. First, we can see from the reports that the process of transforming the judiciary has not been concluded in the accession countries. Therefore, the popular view that institutions safeguarding judicial independence are well in place and problems relate more to implementation, or that one should instead focus on the other side of the coin, namely judicial accountability, is not supported by our findings. In particular, the view that accession countries have gone too far in guaranteeing independence has to be rejected.

On the contrary, the survey indicates that the organizational reform of the court system and the setting up of the institutional guarantees of judicial

independence are *still in progress*. The fact that *constitutional courts* in many accession countries have been invoked several times and are still invoked regularly to decide on the relation between the judiciary and the executive also indicates that there is still lack of clarity as to the exact notion of judicial independence or the concept of separation of powers.

### 6.2

The survey also revealed that in almost all countries there have been attempts by the executive to abuse its existing powers or to regain some of the powers it lost after the political change. Reference by politicians to "shared responsibilities," meant to legitimate pressure exerted on the judiciary, is also quite frequent. As a result, and due to the lack of integrity of the judiciary, courts in "sensitive areas" tend to rule according to what they think is expected of them.

### 6.3

As concerns the allegations that poor court performance calls for measures ensuring judicial accountability and limiting independence, the figures rather indicate that courts settle more and more cases but that both the number of incoming and unsettled cases is increasing. This is an indication that the extreme broadening of the courts' competencies has not been accompanied by adequate increases in staffing and financial resources.

In addition, legislation that could decrease the courts' workload or contribute to the judiciary's more effective operation *has not yet been adopted* or put into effect in a number of countries. The failure of parliaments to adopt the necessary legislation, or the poor quality of laws coupled with the legislator's and the executive's reluctance to provide for adequate staffing and material conditions, results by necessity in the courts' inadequate performance, provoking the criticism voiced by exactly those who share responsibility for the problem.

### 6.4

The relationship between constitutional courts and regular courts seems to be somewhat ambivalent. The reluctance of ordinary courts to respect decisions of the constitutional courts may result in the weakening of judicial independence. If the judiciary itself fails to implement the binding decisions passed by another competent body, how can they expect the governmental powers and

95. Law on Court Executors/Judgment Enforcers, No. 120/2001 Coll.

citizens to observe their decisions and to respect "fundamental independence"?

### 6.5

With reference to accountability, certain guarantees that are traditionally viewed as essential for the judges' independence have been weakened in most accession countries. It seems that first appointment for a fixed term is becoming the rule. Appointing young judges for a definite term is seen as a means to examine judges on whether they have the skills needed for judgeship. However, one may wonder whether fixed-term appointment of young judges, which undoubtedly involves a certain threat to their independence, is really an effective means for achieving the ends stated. It is rather the improvement of the selection process, of the means of evaluating judges, and better training that could raise the efficiency of the courts' performance. Decision-makers, however, perhaps for lack of imagination, or simply for laziness, and eventually meeting populist demands, are instead curtailing independence in the name of efficiency, whereas the means they use are clearly inappropriate for meeting the proclaimed ends.

The same is the case with proposals for lifting judges' immunity envisaged in some of the countries. Those who are in favor of lifting the immunity argue that the notion has to be reinterpreted since immunity may not exempt the judiciary from its obligation not to violate the law. No one ever stated that judges' immunity was meant to encourage judges to commit crimes. But through the envisaged "reinterpretation" the notion is deprived of its rationale and meaning. These examples prove that it is not the root of the problem that is being addressed. Instead of providing for adequate salaries and using sound entry and evaluation criteria, decision-makers opt for nice-sounding but clearly inappropriate measures, involving again the risk of infringing judicial independence.

### 6.6

I would not argue that there is no need for means ensuring accountability. The survey revealed the disquieting fact that there are almost no criminal or disciplinary proceedings introduced against dishonest or clearly incompetent judges. And if introduced, disciplinary bodies (composed in most countries of fellow judges) are rather reluctant to find judges responsible for offenses. This fact and the lack of transparency of the disciplinary procedures may

harm the reputation of the courts and contribute to the public's distrust of the judiciary.

The recent development in the transition countries of the fixed-term appointment procedure and the tendency to question the traditional guarantees of independence should make judges aware that accountability is not to be understood as a threat to judicial independence. On the contrary, the limited enforcement on rules of conduct, especially if coupled with poor performance, may jeopardize independence in the long run. A more self-critical approach and the introduction of novel instruments by which accountability could be strengthened, such as monitoring by civil society, may be effective in counteracting attempts by other branches to weaken judicial independence.